***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

74-1952

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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DOCKET NO. 74-1952

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JAMES T. LATA

PETITIONER-APPELLANT

V.

UNITED STATES OF AMERICA

RESPONDENT-APPELLEE

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# BRIEF OF PETITIONER-APPELLANT

# JAMES T. LATA

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MISCELLANEOUS

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## STATEMENT OF THE CASE

In this case, petitioner filed a petition pursuant to 28 U.S.C. §2255 and Rule 33, Fed. R. Crim. P. seeking a new trial of his bank robbery conviction of March 22, 1973. The District Court, by ruling dated May 6, 1974, denied petitioner's claims to vacate sentence pursuant to 28 U.S.C. §2255 but treated one of the petitioner's allegations as a motion for

a new trial under Rule 33, Fed. R. Crim. P. (app. 1 ) Counsel was appointed and an evidentiary hearing held on the claim for a new trial based upon newly discovered evidence.

The trial court denied petitioner's claim for a new trial (app. 4 ).

Timely notice of appeal was filed on behalf of the petitioner.

## STATUTES INVOLVED

### RULE 33, FED. R. CRIM. P.

NEW TRIAL

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

## QUESTION PRESENTED

DID THE TRIAL COURT ERR IN NOT GRANTING PETITIONER'S CLAIM FOR A NEW TRIAL BASED ON NEWLY DISCOVERED EVIDENCE WHEN PETITIONER PRODUCED A POST-CONVICTION AFFIDAVIT OF CO-DEFENDANT ABSOLVING PETITIONER OF ANY PARTICIPATION IN THE CRIME FOR WHICH HE WAS CONVICTED, BUTTRESSED BY OTHER OUT-OF-COURT STATEMENTS BY CO-DEFENDANT WHEN CO-DEFENDANT, AT THE TIME OF THE HEARING, CLAIMED A FIFTH AMENDMENT PRIVILEGE WHICH WAS UPHELD.

## THE FACTS

At the evidentiary hearing, the affidavit of petitioner's convicted co-defendant, Stuart B. Smith, was offered, by petitioner. (Plaintiff's Ex. 1.). In essence, the affidavit stated that petitioner Lata was not in any way involved in the bank robbery for which he was convicted. Thomas Flood, a licensed private investigator, who took Smith's affidavit, testified that Smith understood the nature of the interview and that Flood was there on behalf of the petitioner Lata. Smith was questioned by Flood as to his physical condition. whether he was under medication and Flood was satisfied that Smith was fully aware of the nature of the interview and voluntarily cooperated in the interview.

Flood further testified that Smith said that Lata was not involved in any way with the bank robbery for which Lata stands convicted; that Smith knew who the actual participant was but hesitated to reveal his identity because the participant was a personal friend, not incarcerated and did not have a criminal record. The affidavit of Flood, concerning the Smith interview, was received into evidence (Plaintiff's Ex. 2).

Also received into evidence was a letter, offered through Flood, bearing the signature of Stuart Smith and dated March 31, 1974, some three months after the execution of the affidavit. Flood testified that the letter was sent directly to him from the state of Washington. Stuart Smith is incarcerated in McNeil Island, Washington. The letter (P-3) states that "I don't want to see Jimmy pay for something he didn't do though". The letter further states that Smith has not heard from Lata or his attorney which infers, at least, a voluntary letter to the taker of the previous affidavit and supporting the contents of the affidavit.

Stuart Smith, called by plaintiff to testify on his behalf, asserted his fifth amendment privilege and was upheld by the court on his assertion and, on a hypothetical basis, asserted his Fifth Amendment privilege on any question posed which would go to the guilt or innocence of Lata.

## ARGUMENT

### The Trial Court Erred in Not Granting a New Trial When the Affidavit of a Convicted Co-defendant, Butressed with Other Testimony, Absolved Defendant of Any Participation in The Crime and when Such Testimony Would Be Admissible as a Declaration Against Penal Interest and Required By Due Process.

These are five basic requirements which must be satisfied by petitioner on his petition for a new trial on the grounds of newly discovered evidence: (1) the evidence must in fact be newly discovered since the trial; (2) facts must be alleged from which court can infer diligence; (3) evidence "newly discovered" must not be merely cumulative or impeaching; (4) it must be material and (5) it must be such that, on a new trial, the newly discovered evidence would probably produce an acquittal. United States v. Silverman, 430 F.2d 106 (2d Cir. 1970).

There is no serious argument that the testimony elicited at the evidentiary hearing would not meet the above standards provided - and this was the linchpin of the court's decision - that the hearsay evidence, in view of Smith's Fifth Amendment assertion, would be admissible at a new trial. In view of that posture by the Court, petitioner will direct his argument

solely to the admissibility question.

A.

As related above, Smith invoked his Fifth Amendment privilege when called as a witness in the hearing on the motion for a new trial. The mere possibility that he will do so again at a subsequent trial does not justify denial of petitioner's motion. Smith has volunteered statements of Lata's innocence in the past as shown in the exhibits and related testimony of Flood. It cannot be predicted with any certainty that Smith would not be prepared to testify consistently at trial. In these circumstances, petitioner should be given an opportunity to elicit personal testimony of Smith in his defense. As the Supreme Court recently states in Chambers v. Mississippi, 410 U.S. 284, 302 (1973), "Few rights are more fundamental than that of an accused to present witnesses in his own defense."

One other potential use of the affidavit and letter may be noted. If Smith were to take the stand and, without claiming the Fifth Amendment, repudiate the exculpatory statement, Lata would have a strong arugment for admission of the evidence in order to impeach Smith under Chambers, supra (See Section III A of Mr. Justice Powell's opinion).

Chambers looked very critically at a state ccurt's refusal to permit cross-examination of an adverse witness on the basis of state evidentiary rules. Though it refused to base its holding on this factor alone, the Supreme Court went to great lengths to detail its displeasure with a state rule which interferes with a defendant's right to meet the charges against him. Both in Chambers and here, the statements were made under oath but not in a prior judicial/adversary proceeding. The thrust of Chambers coupled with the rule in this circuit of United States v. DeSisto, 329 F.2d 929 (2d Cir. 1964) would indicate that such evidence would come in on the merits, not merely to impeach.

B.

The question posed by the Court as to potential admissibility of the newly discovered evidence obviously assumed the continued invocation by Smith of his Fifth Amendment privilege at a subsequent trial. On that assumption, the affidavit, the related testimony of Flood and the letter are independently admissible under the exception to the hearsay rule for declarations against penal interest.

In 1913 the Supreme Court held that an admission by a

third party against his penal interest was not an exception to the hearsay rule. Donnelly v. United States, 228 U.S. 243 (1913). Before the ink had dried, however, the Donnelly holding was under attack. In a vigorous dissent Mr. Justice Holmes laid the cornerstone for the criticism of the majority opinion, a criticism which has caused some state and federal courts to abandon Donnelly. Thomas v. State, 186 Md. 446, 47 A. 2d 43; Hines v. Comm., 136 Va. 728, 117 S.E. 843 (1923); Newberry v. Comm., 191 Va. 318, 61 S.E. 2d 318 (1950); People v. Spriggs, 60 Cal, 2d 868, 36 Cal Rptr. 841, 389 P 2d 377 (1964); Mason v. United States, 257 F.2d 359 (10th Cir. 1958) Sucher Packing Co. v. Manfactures Cas. Inc. Co., 245 F.2d 513 (6th Cir. 1957).

Mr. Justice Holmes wrote:

> "The confession of Joe Dick, since deceased, that he committed the murder for which the plaintiff in error was tried, coupled with circumstances pointing to its truth, would have a very strong tendancy to make anyone outside a court of justice believe that Donnelly did not commit the crime. I say this, of course, on the supposition that it should be proved that the confession really was made, and that there was no ground for connecting Donnelly with Dick. The rules of evidence in the main are based on experience, logic, and common sense, less hampered by history than some parts of the substantive law. There is no decision by this court against the admissibility of such a confession; the English cases since the separation of the two countries do not bind us; the exception to the hearsay rule in the case of declarations against interest

> is well known; no other statement is so much against intrest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man (Mattox v. United States, 146 U.S. 140, 36 L.Ed. 917, 13 Sup Ct. Rep. 50); and when we surround the accused with so many safeguards, some of which seem to me excessive; I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight. The history of the law and the arguments against the English doctrine are so well and fully stated by Mr. Wigmore that there is no need to set them forth at greater length. 2 Wigmore, Ev. §§1447." Holmes. J., dissenting in Connelly v. United States, 228 U.S. 243, 277, 33 Sup. Ct. 449, 57 L. Ed. 820 (1913).

Citing the Holmes dissent, The Proposed Federal Rules of Evidence which were scheduled to go into effect on July 1st of this year recognized the penal interest exception in Rule 804 (4):

> Statement against Interest --- A statement which was at the time of its making so far contrary to the declarant's pecuniary of interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborated.

Recognizing the trend to the adoption of the penal interest exception, this Circuit has all but formally abandoned Donnelly in two recent decisions.

In United States v. Dovico, 380 F.2d 325 (2 Cir, 1967) the defendant was originally indicted with Gangi for selling narcotics. Gangi pleaded guilty and Dovico was convicted after a jury trial. Subsequently, Gangi told a cell mate at Danbury that he committed the crime without Dovico's knowledge and that Dovico was innocent. Gangi died shortly after making the statement. Based on Gangi's admission to his cell mate, a new trial was ordered, but at trial the court held Gangi's statement to the cell mate inadmissible and Dovico was convicted.

On appeal the Second Circuit affirmed and held evidentiary ruling proper on the ground that Gangi's admission to his cell mate was not against his penal or social interest. This was so, wrote the Court, because Gangi had already pleaded guilty to the crime before he made the statement and therefore it was not definitely against Gangi's penal or social interest. Id. at 327. "He could not be prosecuted for the 'declaration against penal interest'," said the Court. Id.

In dictum the Court said: "While it may be that penal and perhaps social interest should be included [as an exception to the hearsay rule] this case does not present the appropriate vehicle for such inclusion." Id.

In footnote two the Court acknowledged the persistent attack on the Donnelly majority.

> Declarations against penal or social interest have not been generally recognized in the federal courts as exceptions to the hearsay rule. Donnelly v. United States, 228 U.S. 243, 33 S Ct. 449, 57 L. Ed. 820 (1913). There has, however, been a growing tendency in the courts to follow Mr. Justice Holmes' dissent in Donnelly and recognize an exception for declarations against penal interest, with support from commentators and codifiers. See, e.g., People v. Spriggs, 60 Cal. 2d 868 36 Cal. Rptr. 841, 389 P. 2d 377 (Calif. 1964); Mason v. United States, 257 F.2d 359 (10th Cir. 1958); Model Code of Evidence, Rule 63 (10) (1965).

Again last year, this Circuit, citing Dovico, supra suggested that the Donnelly holding is soon to be formally abandoned. United States v. Marquez, 462 F.2d 893 (2 Cir. 1972). In fact Marquez, suggests that Donnelly has been abandoned and this Circuit now recognizes the penal interest exception to the hearsay rule:

> Appellants' first contention is that the district court erred in excluding a post-arrest, pre-arraignment statement made by co-defendant Otero to an Assistant United States Attorney. The Assistant recorded the substance of Otero's remarks on an interview form as follows:
>
> "Cocaine mine. Other guys had nothing to do with it. Got cocaine yesterday. Don't know who I got it from."
>
> Since Otero was unavailable at the time of trial, appellants sought to overcome the hearsay obstacle by arguing that the statement was admissible as a declaration against penal interest. An examination of the statement reveals, however, that not all of it constitutes a declaration against Otero's penal interest. As we noted in United States v. Dovico, 380 F.2d 325, 327

(2 Cir. 1967), cert. denied, 389 U.S. 944 (1967), "[e]ven a broadened penal interest exception must have some boundaries and must be limited at least to statements admitting a particular crime for which prosecution is possible at the time." Otero's statement that the "[o]ther guys had nothing to do with it" does not satisfy the Dovico test. This declaration did not admit an additional crime or subject Otero to more serious charges or more severe punishment. Otero merely sought to exculpate his friends, and the statement therefore lacks the inherent reliability which justifies the declaration against interest exception to the hearsay rule. See United States v. Seyfried, 435 F.2d 696, 697-98 (7 Cir. 1970), cert. denied, 402 U.S. 912 (1971).

Otero's statement that the "[c]ocaine [is] mine" does appear, however, to be a declaration against penal interest. Even if we were to assume that declarations against penal interest should be admissible as an exception to the hearsay rule, the most that would have been proper would have been to admit that portion of Otero's statement which was against his penal interest and exclude the remainder. See United States v. Seyfried, supra, 435 F. 2d at 698; McCormick, Evidence 553 (1954). Appellants never argued below, however, that Otero's statement was separable and that at least a portion of it was admissible. Absent such a request, we do not think that the district court should be faulted for excluding the entire statement.

Moreover, even if we were to recognize declarations against penal interest as an exception to the hearsay rule and considered that the district court erred in excluding Otero's declaration that the "[c]ocaine [is] mine", we would be satisfied that any error was harmless. . . United States v. Marquez, supra at 894-895 (emphasis supplied)

If any doubt persists that Donnelly will be formally abandoned by this Circuit or by the Supreme Court shortly,

United States v. Harris, 403 U.S. 573 (1971) should dispel it. In Harris the Court was faced with deciding whether the informant in a search warrant for distilled spirits satisfied the Aquillar-Spinelli test. The affidavit failed to recite the informant's past reliability. However, the Court noted that the informant implicated himself in other crimes. "These statements", wrote Chief Justice Burger, for the majority, "were against the informant's penal interest, for he thereby admitted major elements of an offense under the Internal Revenue Code." Id. at 583.

The Court went on to note: "Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit these statements. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility sufficient at least to support a finding of probable cause to search." Id. at 583

Although it was not required by the facts of the case, the Chief Justice, made it abundantly clear that the Court was about to adopt Mr. Justice Holmes' dissent in Donnelly, supra:

> It may be that this informant's out of court declarations would not be admissible at respondent's trial under Donnelly v. United States, 228 U.S. 243 (1913), or under Bruton v. United States, 391 U.S. 123 (1968). But Donnelly's implication that statements against penal interest are without value and per se inadmissible has been widely criticized; see the dissenting opinion of Mr. Justice Holmes in Donnelly, supra at 277; 5 J. Wigmore, Evidence §1477 (3d ed. 1940), and has been partially rejected in Rule 804 of the Proposed Rules of Evidence for the District Courts and Magistrates. More important, the issue in warrant proceedings is not guilt beyond reasonable doubt but probable cause for believing the occurence of a crime and the secreting of evidence in specific premises. See Brinegar v. United States, supra, at 173. Whether or not Donnelly is to survive as a rule of evidence in federal trials, it should not be extended to warrant proceedings to prevent magistrates from crediting, in all circumstances, statements of a declarant containing admissions of criminal conduct. As for Burton, that case rested on the Confrontation Clause of the Sixth Amendment which seems inapposite to ex parte search warrant proceedings under the Fourth Amendment. United States v. Harris, 403 U.S. 573 (1971)

The facts surrounding Smith's statements - as well as their contents - show that they were made in derogation of his penal interest. The affidavit of Smith, as noted above, asserts Lata's innocence of the Meriden bank robbery for which Smith and Lata had been convicted. The subsequent letter further avers that Smith knows the idenity of the other party actually involved (a friend of Smith with no criminal record and who is not incarcerated) but that he would "hate to hurt the other man" by divulging his idenity. It should be noted that

the two assertions contained in these statements are inextricably linked. At trial, the government proof showed that three persons (Sponza being deceased at time of trial) committed the bank robbery. Thus, if admissible as a declaration against penal interest, Smith's statement incriminating someone else necessarily exculpates defendant Lata.

It is submitted that the Smith statements can reasonabl be viewed as subjecting him to prosecution as an accessory after the fact. 18 U.S.C. §3 provides in pertinent part:

> "Whoever, knowing that an offense against the United States has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact."

The elements of the offense are (1) knowledge that an offense has been committed, and (2) relief, comfort or assistance of the offender. As a recent decision has phrased it, "The gist of being an accessory after the fact lies essentially in obstructing justice by rendering assistance to hinder or prevent the arrest of the offender after he has committed the crime." United States v. Barlow, 470 F.2d 1245 (C.A.D.C. 1972). As with aiding and abetting, it is not a precondition as an accessory after the fact that the principal has been convicted, United States v. Walker, 415, F.2d 530 (9th Cir. 1969). Nor does participation in the actual offense

bar prosecution as an accessory; as the Court of Appeals for the District of Columbia held in Smith v. United States, 306 F.2d 286 287 (C.A.D.C. 1962), 18 U.S.C. §3 "makes no exception for persons who are present at the scene of the crime, or who may have participated in the planning or execution of the offense".

That Smith's prior conviction for the substantive offense would not bar prosecution as an accessory to the other (unidentified) principal is made clear by Virgin Islands v. Aquino, 378 F.2d 540 (3d Cir. 1967). A central question on appeal in that case was whether defendant, charged as a principal in the commission of a rape, could be convicted as an accessory after the fact. The government had argued (1) that the Virgin Islands Code (which parallels 18 U.S.C. in the pertinent sections) supported the conviction in that Section 2 thereof eliminates the distinction between accessories before the fact and principals; and (2) that the accessory charge was a lesser included offense to the primary charge of rape. The Court rejected the first contention on the grounds that the statute clearly distinguishes between accessories before the fact/principals and accessories after the fact; its opinion sets forth the basic substantive distinction relevant here:

> "In obliterating the common law distinctions between principals...and accessories before

> the fact, these statutory provisions have specifically retained the fundamental distinction between an accessory before the fact - now a principal - and an accessory after the fact. This distinction survives the reason for the elimination of the distinction between principals...and accessories before the fact, for it rests upon a substantive difference in the nature of the criminal conduct involved...The offense (of accessory after the fact) thus can occur only after the substantive crime has been committed and it is in no way an element of the crime. (Emphasis added).
>
> Virgin Islands v. Aquino, supra at 553

On similar reasoning, the court refused to allow the conviction to stand under the lesser included offense doctrine:

> "[I]t has been recognized under Fed. Rules Crim. P. 31 (c) that the lesser offense must be such that it is impossible to commit the greater offense without having first committed it. To give assistance in avoiding apprehension or punishment of a crime knowing that it has been committed has nothing in common with the elements essential to establish a charge of rape. (Emphasis addes)
>
> Virgin Islands v. Aquino, supra at 554.

The teaching of Aquino is clear: the substantive law provides separate and distinct definitions for liability as a principal and as an accessory after the fact. Since different elements of proof are required for conviction, under well-established principles there is nothing to prevent

prosecution on both charges, and in the present case Smith's conviction as a principal would not bar his prosecution as an accessory with respect to the other offender.

Smith's conduct would support both elements of an accessory prosecution. The affidavit and letter themselves admit knowledge of the substantive offense, and that an unidentified person, known to Smith, was the offender. And he rendered direct and palpable relief, comfort or assistance in his admitted wilfull suppression of the evidence of the offender's identity from the authorities. On this latter point it should be noted that 18 U.S.C. §3, unlike §4 of the same title (misprison of a felony) appears not to have been interpreted as requiring specific positive acts in addition to failure to divulge information. Although the typical accessory situation involved, e.g. sheltering a fugitive or providing direct assistance in eluding the authorities, petitioner has found no authority requiring such independent acts over and above an explicit withholding of evidence. And as a practical matter it is difficult to see what greater assistance he could render his un-named friend in avoiding prosecution than to refuse to provide the authorities with the crucial evidence which only Smith could provide and has voluntarily indicated that he knows.

A further condition for invoking the exception is that the declarant must have been aware that it was against

his interest at the time the statement was made. Such an awareness on Smith's part can certainly be implied at the time of the giving of the affidavit. He was incarcerated following his conviction for the bank robbery, and he gave a sworn affidavit to an investigator acting on behalf of Lata. His intimate proximity to the criminal law institutions and processes could not help but impress him with the seriousness of his situation and the potential for further sanction. And the fact that the statements and affidavit were given, not to a close acquaintance, but to a state-licensed independent investigator, for use in subsequent judicial proceedings, made recourse to penal measures a realistic possibility. Furthermore, the letter to Flood not only reaffirms the previous statement and affidavit but also evidences Smith's appreciation of his own predicament, in Smith's words: "I feel I'm in the middle." A reasonable man would not have made the statement under these circumstances unless it were true.

C.

Aside from the niceties of the hearsay rules, the admission of the question in evidence is mandated by due process.

Certainly the constitutional parameters on admission of evidence such as that involved in the present case are

different where it is proferred not by the government against the accused but is to be introduced by the defendant in his own behalf. In the latter case, the constitutional right to confrontation simply does not apply. For example, in United States v. Brown, 411 F.2d 1134 (10th Cir. 1969), defendant sought to introduce testimony of a witness (Speer) taken ex parte by the government in an IRS investigation. The witness, who was unavailable at the time of trial, had supported the defense of lack of specific intent. The trial court had excluded the evidence, and on appeal a new trial was ordered. The Court of Appeals, observed that Speer's testimony could not have been admitted on behalf of the government because the defendant would have been helpless to refute it through cross-examination. The government's interest in cross-examination is not of Constitutional status, however, so that where such evidence is offered by the accused the question is only whether it appears sufficiently reliable to satisfy the rationale underlying the hearsay rule. The court found the statements in Brown to be sufficiently reliable for the evidence to go to the jury; among the factors cited in reaching this conclusion were the cooperativeness of the witness, the fact that he was under oath and subject to perjury charges for

falsehood, and that the witness himself was in penal jeopardy at the time the statements were made. United States v. Brown, supra at 1130.

The constitutional framework was elaborated in Chambers v. Mississippi, 410 U.S. 284 (1973). Charged with murder in connection with a shooting in a crowd, the defendant sought to show that it was actually another man, McDonald, who was guilty. McDonald had signed a written confession, which he later repudiated, and had made incriminating statements to at least three persons. Called to the stand, McDonald again denied the verity of the confession The court did not allow Chambers' counsel to cross-examine McDonald as an adverse witness, relying on Mississippi's voucher rule. More importantly for our present purposes, the state court also refused to admit the testimony of the three persons to whom McDonald had made inculpatory statements, on the grounds that they were hearsay. The Supreme Court reversed, holding that the trial court's exclusionary ruling deprived Chambers of due process.

In this branch of its opinion, the Court began by noting that the purpose of the hearsay rule is to promote trustworthiness, and that out-of-court statements are normally excluded because they are lacking in the traditional indicia of reliability, oath, cross-examination, and jury observation of demeanor. Exceptions to the rule are premised on some

substitute assurances of reliability. One of these is the exception for declarations against interest, "founded on the assumption that a person is unlikely to fabricate a statement against his own interest at the time it is made" Chambers v. Mississippi, supra, at 299. The court observed that the Mississippi rule recognized the exception where pecuniary or proprietary interests were involved, but not penal; it then proceeded to state:

> "This materialisic limitation on the declaration - against - interest hearsay exception appears to be accepted by most States in their criminal trial processes, although a number of States have discarded it. Declarations in federal courts under the authority of Donnelly v. United States... although exclusion would not be required under the newly proposed Federal Rules of Evidence."
>
> Chambers v. Mississippi, supra at 299.

Nothwithstanding the contrary state and federal evidentiary rules, the court proceed to hold exclusion under the circumstances of Chambers to amount to a denial of due process. Those circumstances, the court insisted, bore ample indica of reliability to support admission on the ultimate question of guilt or innocence. Justice Powell summarized the Court's position:

> "Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long

> existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (Emphasis added)
>
> Chambers v. Mississippi, supra at 302.

It appears that, just as the confrontation clause imposes independant standards for exclusion of hearsay evidence against an accused, the due process clause in certain instances requires that such evidence be put before the jury in order that he may receive a fair trial.

Chambers does not purport to closely define the test to be applied, suggesting that a close determination must be made on the facts of each case. The outcome appears to hinge on two central factors, however; (1) the testimony must be of central importance to the defense and (2) satisfactory indicia of reliability must exist. On the first point, there can be no doubt but that direct testimony exculpating Lata and incriminating someone else would be of crucial importance in a new trial.

The present facts are also extremely persuasive on the question of reliability. The affidavit of December 1973 is, as it states on its face, free and voluntary. It was made under oath and subject to the penalties of perjury. That it

was fully considered is indicated by the statement that Smith understood that it was to be used in court. And the fact that it was made not to a close acquaintance who might be expected to keep it a secret but to an independant investigator makes it even more persuasive than the confession in Chambers. As in Chambers. the statements were contrary to Smith's penal interest. Finally, the content was reaffirmed at Smith's own initiative in the letter some five months later. In that letter Smith did not waiver in his declaration of Lata's innocence, indeed, he elaborated on the prior affidavit. Taken together, these factors fully support a finding of reliability.

## CONCLUSION

The petitioner's facts stand unrebutted on the record. There can be no argument that, given the admissibility of the evidence, the evidence was newly discovered with deligence and not merely cumulative. There can also be no soubt that the proclamation of Lata's innocence by a convicted co-defendant who has withdrawn his appeal is material on the ultimate question of a criminal trial; and while not blessed with a crystal ball, petitioner believes that the gravity of exculpation by a co-defendant would probably produce an acquittal.

There is always lurking in the background on this type of case the unspoken theory of a fraud upon the courts. None has been shown and as it has been observed:

> "A jury is more sophisticated about the possibilities of private coercion to obtain such exculapting statements than they are about the analogous governmental pressures to obtain inculpating statements. Exculpatory statements are no different in this respect from any other testimony. Even if they were, free reception of exculpating statements and not inculpating ones can be justified on the ground that there is not and never has been parity between the rules or burdens applicable to the Government and those applicable to the defense."
>
> Rothstein, The Proposed Amendments to the Federal Rules of Evidence, 62 Geo. L.J. 125, 154 n. 151

Petitioner, who testified at his own trial, has steadfastly maintained his innocence. That claim has now

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the brief and appendix for petitioner appellant was mailed, postage pre-paid, this 20th day of September, 1974 to Peter Clark, Esq., Assistant United States Attorney, Post Office Building, New Haven, Ct. and James T. Lata, P.O. Box 1000, Lewisburg, Pa.

Thomas D. Clifford

Thomas D. Clifford

been corroborated. Due process requires that a jury determine that claim in the light of this newly discovered evidence and justice requires no less. Petitioner respectfully requests this court to reverse the judgment below and remand for a new trial.

THE PETITIONER
JAMES T. LATA

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